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BRIEF OF INTERVENORS-APPELLANTS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 563

THE SOUTH CAROLINA STATE BOARD OF EDUCATION, a public corporate body, and CYRIL B. BUSBEE State Superintendent of Education, et al. ..... APPELLANTS,

and

MRS. ERNEST T. CRIBB, et al, ... INTERVENORS-APPELLANTS,

vs.

J. ARTHUR BROWN, et al. ..... RESPONDENTS.

and

UNITED STATES OF AMERICA, by RAMSEY CLARK, Attorney General of the United States, ... INTERVENORS-RESPONDENT.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF SOUTH CAROLINA, COLUMBIA DIVISION

By: MRS. ERNEST T. CRIBB, et al, ... INTERVENORS-APPELLANTS.

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

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Intervenors-Appellants appeal from the judgment of the United States District Court for the District of South Carolina,

entered May 31, 1968 enjoining the enforcement of the South Carolina Scholarship Grant statute and submit this statement to show that this Court has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the United States District Court for the District of South Carolina, Columbia Division, convened as a three judge District Court is reported at.....F. Supp.....

JURISDICTION

Respondents instituted this action in the District Court seeking to enjoin implementation of the South Carolina Scholarship Grants Act of 1963. This Act provides for the payment of scholarship grants to every school child in South Carolina who has not yet finished high school, who desires to attend a private, non-parochial school in South Carolina, and lives in a School District which elects to make the Scholarship Grant Act available to children within the district. The Respndents asked a declaratory judgment that such Act is unconstitutional as in contravention of the equal protection clause of the Fourteenth Amendment. Judgment of the District Court was entered May 31, 1968 and its order denying a rehearing, a new trial and a modification of the judgment was entered June 27, 1968. Notice of Appeal was filed July 26, 1968 in the United States District Court, District of South Carolina, Columbia Division. This Court has jurisdiction of this appeal under 28 U.S.C.A. 1253, 2101(b). *United States vs. Georgia Public Service Commission*, 371 U.S. 285, 287.

STATUTES INVOLVED

The provisions of the Scholarship Grants Act of 1963 (1963 Acts 498, Supplement, 1962 Code of Laws for South Carolina,

Sections 21-297 through 21-297.8, are as follows:

STATUTES AT LARGE OF SOUTH CAROLINA
General and Permanent Laws—1963

No. 297

An Act To Provide State Scholarship Grants; To Fix The Amount Thereof; To Provide For The Supplementing Of Such Grants By The School Districts Of The State; To Vest In The State Board Of Education The Power And Duty To Make Rules Governing Scholarship Grants; To Fix Penalties For Misapplication Of Scholarship Funds And For Other Purposes,

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Findings of General Assembly.—The General Assembly finds that the cause of primary and secondary education in South Carolina will be advanced if individual children of school age, their parents and guardians, are made free to choose between public and private educational institutions. Provision has been made for the transfer of pupils from one public school to another, subject to such limitations as may be necessitated by local conditions, and it is considered highly desirable that the freedom to choose among available educational institutions be extended and enlarged by providing scholarship grants for children entitled to attend primary and secondary public schools who wish to attend private or independent institutions, such scholarship grants to be furnished from State funds supplemented by local school districts.

SECTION 2. Definitions.—The following words and phrases as used in this act shall, unless a different meaning

is plainly required by the context, have the following meanings:

(a) "School Child" shall mean any person between the ages of six and twenty whose domicile is with his or her parent within the State and who is otherwise qualified to attend the public schools of any school district in which he or she resides.

(b) "Parent" shall mean the natural or adoptive parent or the guardian having legal custody of a child eligible and entitled to receive a scholarship grant under this act who is actually paying or who will pay the tuition costs of attendance of such child at a school which qualifies such child to receive a grant under the terms of this act.

(c) "Private School" shall mean a private or independent elementary or high school which is not operated or controlled by any church, synagog, sect or other religious organization or institution.

SECTION 3. Persons eligible to receive scholarship grants.—Subject to the terms and provisions of this act every school child in the State who has not yet finished or graduated from high school and who desires to attend a private school located within the State shall be eligible for and entitled to receive a State scholarship grant in an amount equal to the per pupil cost to the State of public education as certified by the Governor.

SECTION 4. Funds for grants.—The State scholarship grants provided for in Section 3 of this act shall be payable from funds appropriated by the General Assembly for the payment thereof.

SECTION 5. Local school district to furnish funds.—It shall be a prerequisite to the grant above permitted that

the local school district in which the school child resides make available a grant of local funds to such school child and to that end the trustees of each school district within the State are hereby authorized to appropriate funds in addition to the State scholarship grants provided for in Section 3 of this act in such amount that is equal to the per pupil cost to the school district exclusive of all State funds received for such purposes. The trustees of each school district are authorized to levy taxes where the school district has the power to tax, to raise funds for the payment of such local supplements to the State scholarship grants. The State Board of Education shall render such assistance to the trustees as may be necessary to determine annual per pupil expenditures of the school district for the purpose of fixing the amount of any supplement to be paid under this section.

SECTION 6. Grant not to exceed tuition.—The total of the annual scholarship grant provided for each child by this act shall not exceed the actual cost of tuition at the private school attended by the child.

SECTION 7.—Rules and regulations.—The State Board of Education is hereby authorized and directed to promulgate such rules and regulations, consistent with the terms of this act, for the receiving and processing of applications for scholarship grants, the payment of grants and the administration of this act generally as it may find necessary or desirable. Such rules may, among other things, provide for the payment of scholarship grants by the school districts of the State to the parent of any child entitled to receive a scholarship grant in installments or otherwise, and for the proration of scholarships for children attending school less than a full school year; they

shall include a minimum academic standard that shall be met by any school in order to entitle children attending such school to receive a scholarship grant; *provided*, however, that no rule promulgated under the authority of this act shall restrict, or in any way affect, the requirements of such school concerning the eligibility of pupils who may be admitted thereto or specify minimum physical plant facilities of any such school.

SECTION 8. Unlawful to misuse scholarship funds.—It shall be unlawful for any person to obtain, attempt to obtain, expend or attempt to expend, any scholarship funds provided by this act for any purpose other than in payment of, or reimbursement for, the tuition cost of the child to whom such scholarship has been awarded at the institution he or she is authorized to attend under his or her scholarship grant.

SECTION 9. Penalties.—Any person convicted of violating the provisions of this act shall be punished by imprisonment for a term not to exceed three years or by a fine not to exceed two thousand dollars, or by both, in the discretion of the court.

SECTION 10. Saving clause.—If any portion of this act, or the application thereof to any person or circumstance is, for any reason, declared unconstitutional, such declaration shall not affect the validity of the remaining portions of this act or its application to other persons and circumstances.

SECTION 11. Repeal.—All acts or parts of acts inconsistent herewith are repealed.

SECTION 12. Time effective.—This act shall take effect upon approval by the Governor.

Approved the 5th day of June, 1963.

QUESTIONS PRESENTED

1. This appeal presents to the Supreme Court for the first time the question, whether a state can constitutionally enact a statute which would provide for funds to be paid to children or parents of children attending private non-parochial schools of their choice?

2. May a District Court of the United States declare a statute constitutional on its face, unconstitutional based on the Court's speculation as to the motive of the legislators in the enactment of the statute?

3. Is the South Carolina Scholarship Grants Act, which would be held constitutional in a non-southern state, rendered unconstitutional merely because the State of South Carolina has had a history of racial school segregation?

4. In a case where the effect of a state statute, constitutional on its face, *may* have the effect of perpetuating segregation in a particular application of the statute, is the appropriate relief permanent injunction declaring the entire statute unconstitutional, where the trial court could retain jurisdiction, and enjoin only the particular implementation of the statute which actually does result in perpetuating segregation?

STATEMENT

This action was commenced as a class action by Negro citizens seeking to enjoin the implementation of the South Carolina Scholarship Grants Act, alleging that the Act was passed for the purpose of depriving respondents of the equal protection of the laws under the Fourteenth Amendment and therefore is unconstitutional. The respondents alleged that jurisdiction for the action arose under the Fourteenth Amendment, and under 28 U.S.C.A. 1331, 1343, 2281, 2284 and 42

U.S.C.A. 1981, 1983, and asked declaratory relief for the class pursuant to 28 U.S.C.A. 2201, 2202 and Rule 57, Fed. Rules of Civ. Proc.

Mrs. Ernest T. Cribb and her fellow Intervenors-Appellants, are the parents of children attending East Cooper Private School, which is located in School District No. 2, Charleston County, State of South Carolina, which District had elected to utilize the South Carolina Scholarship Grant Act, and these parents, but for the order of injunction entered by the United States District Court, would have been entitled to receive tuition grant funds under the South Carolina Scholarship Grant Act. Mrs. Cribb and her fellow Intervenors-Appellants were allowed to intervene as parties Defendants in this action by order of the District Court on March 25, 1965.

The District Court of the United States issued *ex parte* orders dated March 9, 1965 and March 12, 1965, temporarily enjoining the making of payments under the Act until the case could be heard on the merits, and thereafter denied defense motions to vacate the temporary restraining orders.

The United States filed its complaint in intervention October 1, 1965, pursuant to The Civil Rights Act of 1964 (42 U.S.C.A. 2000(h)-2, alleging substantially the same facts as those alleged in the amended complaint of the original plaintiffs, and that the purpose and effect of the adoption and implementation of the Scholarship Grants Act was to unconstitutionally circumvent school desegregation requirements first enunicated in *Brown vs. Board of Education,* 347 U.S. 483 (1954).

The appellants, State Board of Education and the State Superintendent of Education, answering respondents' amended complaint and that filed by the United States, denied knowledge of any racial discriminatory policy of the several private schools mentioned in the complaint and denied the uncon-

situtionality of the statute. The defendant school districts denied any information as to discriminatory enrollment policies of the several private schools and denied the invalidity of the statute.

The Intervenors-Appellants filed answers in which they pled the validity of the Act on its face and in which they further pled that the Act, as applied to the school which their children attend, East Cooper Private School, was constitutional in effect. They further pled that the East Cooper Private School had no rules, regulations, by-laws or policy restricting enrollment to Caucasians, and that no Negro children had applied to the East Cooper Private School.

On May 13, 1968, the cause was heard before the Hon. Albert V. Bryan, Circuit Judge, the Hon. J. Robert Martin and the Hon. Robert W. Hemphill, District Judges, upon a written record, sitting as a three-judge District Court. In a *per curiam* opinion filed May 31, 1968, the Court said: "Act No. 297 is unconstitutional. A review of the record, including the historical background of the Act, clearly reveals that the purpose, motive and effect of the Act is to unconstitutionally circumvent the requirement first enunciated in *Brown vs. Board of Education*, 347 U.S. 483 (1954), that the State of South Carolina not discriminate on the basis of race or color in its public educational system." The Court permanently enjoined appellants from enforcing the statute. Appellants filed a motion for a rehearing, a new trial and for a modification of the judgment, which motion was denied by order of June 27, 1968.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The Court in *Brown vs. Board*, 347 U.S. 483, 493 (1954) said: "Today education is perhaps the most important function of state and local government." More recently in *Board*

of Education v. Allen, 20 L.Ed. 1060, 1068 (1968) the Court noted that private school education plays a significant role in raising the levels of knowledge. High quality education, whether public or private, is an "indispensible ingredient" in the kind of nation Americans desire.

Recognizing its responsibility to provide quality education for its children and to give to them the opportunity of finding this education in private or public schools South Carolina enacted the statute here in issue to give to every child the choice of attending a public school or a private non-parochial school located within the state. A scholarship grant equivalent to the per pupil cost to the State of public education was made available to the parent provided the school district made available the per pupil cost to the district of public education.

The General Assembly in Section 1 of the Act finds that the cause of education will be advanced if the school child is free to attend the school best fitted to his talent and ability, be it public or private. This finding that education is benefited if both public and private schools are available is supported by the uncontradicted evidence of educators found in the record here. There is no place in our industrialized society for the uneducated and the unskilled. States are seeking new ways and new methods to bring quality education to all children. This scholarship grant statute is one of the new ways. The need for education is so great that states should experiment even if some experiments fail. *New Ice Company vs. Liebman,* 284 U.S. 262, 311 (dissent by Mr. Justice Brandeis).

1. Intervenors-Appellants have been unable to find any decision by this Court declaring constitutional or unconstitutional, under the provisions of the Fourteenth Amendment, a state statute providing scholarship grants to children or parents of children who attend non-sectarian private schools of their

choice, in a factual situation where no other constitutional objections are raised.

A three judge United States District Court held that the State of Virginia could lawfully enact a scholarship grant program providing funds for children attending non-sectarian private schools. *Griffin vs. State Board of Education,* D.C. Va. (1965) 239 F.Supp. 560. The District Court in *Poindexter vs. La. Assistance Commission,* 275 F.Supp. 833 (1967) Aff. 389 U.S. 571 (1968) did not hold that, absent the racial problems, such a scholarship grant law constitutionally objectionable.

On the record before this Court, where only a very few students attending only two schools for one semester received such aid, the holding of the Court below is in effect a holding that a State cannot enact a valid scholarship grant law providing tuition aid to students attending non-sectarian schools.

Intervenors-Appellants respectfully submit that this presents an important, substantial question that should be decided by this Court.

2. In concluding that the South Carolina statute violated the Fourteenth Amendment because of the purpose and motive of the legislature the District Court departed from the firmly established rule that in passing on the constitutionality of statutes Courts do not consider the motives and purposes of the Legislature. *United States vs. O'Brien,* 20 L.Ed. 2d 672, 683 (1968); *Arizona vs. California,* 283 U.S. 423, 455 (1931); *Zorach vs. Clauson,* 373 U.S. 306, 310 (1952); *Daniel vs. Family Security Ins., Co.,* 336 U.S. 220, 223, (1949). If the legislature has the constitutional power to enact the statute the Court does not concern itself with its wisdom. *Angle vs. Chicago*

Ry. Co., 151 U.S. 1, 18. Even corrupt motive is not a question for judicial inquiry. *Fletcher vs. Peck*, 6 Cranch 87, 3 Law Ed. 162.

3. Your Intervenors-Appellants file this Jurdisdictional Statement with a certain sense of futility.

That the South Carolina Scholarship Grants Act, enacted by the United States Congress, or by the State of Michigan, would be held constitutionally unobjectionable is clear. Similarly, that a heavy burden, almost a presumption of unconstitutionality, lies upon any Statute affecting the schools located in South Carolina is also clear.

This is unfortunate for the State of South Carolina, its citizens, black and white, and for all of the citizens of the United States.

This case presents a substantial question which goes far beyond the legal issue presented. This case is important because it presents in an especially clear-cut manner whether or not the State of South Carolina, or any southern state, in a case with racial segregation overtones, can receive a full and impartial hearing under the traditional constitutional guidelines applicable where a Statute is charged on grounds that it violates constitutional provisions.

The reading of the Statute involved shows it to be completely and absolutely free of any racial reference, implicit or express. A cursory examination of the record will clearly demonstrate that the holding of the District Court that the motive, purpose and effect of the Statute is to circumvent the two historic *Brown* decisions is based entirely and solely on the fact that in the past South Carolina racially segregated its schools and that some of its citizens still prefer such schools.

We respectfully submit that the time has come in the history of this country for the Courts of the United States to give the citizens of South Carolina an opportunity to demonstrate that they can, in good faith, comply with the constitutional requirements affecting the schools.

A temporary injunction prevented your Intervenors-Appellants from receiving any funds under the South Carolina Scholarship Grants Act, and no child attending the East Cooper Private School has received the benefit of this Act.

We respectfully submit that the Order appealed from, which, as to the effect of the challenged Act is purely speculative, amounts to a denial by the Courts of the United States of your Intervenors-Appellants' right to the equal protection of the laws solely because they are southern Caucasians.

4. The relief granted to Respondents herein was permanent enjoining of the operation of the South Carolina Scholarship Grant Act.

The only persons receiving grants under the Act were the parents of children attending two schools, and these parents only received payment for one semester of school.

Given these facts we submit that the granting of such relief is entirely inappropriate.

The Courts of the United States have in the years since 1954 amply demonstrated that they are fully able to compel compliance with constitutional provisions by the schools of the south. In the event the State of South Carolina were to abolish its public school system and substitute for it, for the purpose of educating the children of the state, a scholarship grant program for private schools, we have no doubt that the United States District Court for the District of South Carolina would see that the substituted private school system would not be

operated in a manner which deprived Negro school children of the equal protection of the laws. The Courts would not, of course, hold that, in the absence of a public school system, an act similar or identical to the South Carolina Scholarship Grant Act, unconstitutional on its face, and would not, of course, completely enjoin its operation. The Court would, on a case by case and a school by school basis, apply the appropriate constitutional standards.

As regards what is appropriate relief, *Poindexter, supra,* should be compared on a factual basis with this case. In *Poindexter, supra,* a great many Louisiana private schools received the "preponderant" portion of their financial support from the state. In *Poindexter, supra,* the Court was able to see the *actual,* and not *speculative* affect of the Louisiana statute. In the case at bar, only five private schools are involved. Only two of these schools have ever received any money and those for only one semester, and all five of these schools are currently operating in a thriving condition. Your Intervenors-Appellants' children attend East Cooper Private School and have never received any money whatsoever from the State of South Carolina. The School itself has no policy, rule, or by-law which excludes children of any race. No Negro child has ever applied to the East Cooper Private School, despite invitations to that effect delivered to counsel for the Plaintiffs-Respondents during the course of this litigation.

Considering the delicate balance of our Federal System, it is respectfully submitted that to enjoin completely the operation of a state statute, upon this record, is inappropriate relief.

CONCLUSION

The questions present substantial federal issues which have been erroneously decided below. The Court should reverse

and remand to the District Court with instructions that it retain jurisdiction in the event respondents can show that the effect of the Act is unconstitutional, or in the alternative, should note probable jurisdiction and schedule the cause for a hearing on the merits.

Respectfully submitted,

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Charleston, S. C.
September 19, 1968

CERTIFICATE OF SERVICE

I, J. C. Long, one of the attorneys for Mrs. Ernest T. Cribb, et al, Intervenors-Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 23 day of September, 1968, I served copies of the foregoing Jurisdictional Statement to the Supreme Court of the United States on Counsel for the several parties thereto, as listed below by depositing or causing to be deposited in the United States Post Office in Charleston, South Carolina, with proper postage prepaid, copies of the aforesaid Jurisdictional Statement:

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